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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/904,794	07/12/2001	Robert J. Germick	5468	1785

7590 02/07/2006  
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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT PAPER NUMBER

1761

DATE MAILED: 02/07/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/904,794	<b>Applicant(s)</b> GERMICK ET AL.	
	<b>Examiner</b> Steven L. Weinstein	<b>Art Unit</b> 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 16 November 2005.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 21-29 and 32-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 21-29 and 32-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 21-29 and 32-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Crowder ('853) in view of Mannara ('782), further in view of Kinney ('720), Friedman ('060), Gundlach et al ('651) and French et al ('294).

In regard to claim 21, Crowder discloses a method for producing a food item comprising flowing a flowable food product (#52) through a fill tube (#32) in a flow direction, and introducing a food ingredient (#51) into the flowing flowable food product in the fill tube through an entry point in the form of a first duct (#28) formed in a supply tube (#24') spaced from a free end of the supply tube, with the supply tube being formed by an annular wall extending from outside the fill tube to the free end and having an inner and outer surface; said flowable food product contacting the outer surface (of said supply tube) and said food ingredient flows within the inner surface (of said supply tube); said free end (of said supply tube being inside the fill tube with the supply tube extending into the fill tube in the direction of flow (of said flowable food product) and with the supply tube having a cross sectional size smaller than the tube; said duct (#28) terminating at the outer surface (of the supply tube) and not presenting a ledge in the fill tube behind which the flow of food product can build up, with the duct (#28) terminating at the inner surface (of the supply tube) and not blocking the flow of the food ingredient in the supply tube; said food ingredient (#51) flowing into said flowable, flowing food

product (#52) through said duct (#28). Mannara et al can be relied on as further evidence of the conventionality of providing one flowable, food containing tube within another flowable, food containing food wherein the inner tube has ducts (#33) which allows for the introduction of one flowing food into another flowing food and wherein the duct in the inner tube extends only to the opposing outer surfaces of the tube, thus not presenting any ledges. Claim 1 appears to recite that the food ingredient is introduced into the flowable food product opposite to the flow direction (of the flowable food product?). Crowder teaches two flow directions for the entry of one flowable product into another flowable product. Crowder appears to introduce the food ingredient perpendicular to the flow of the flowable food product in the two concentric tube assembly wherein the food ingredient flows from the inner, supply tube (#24') through a duct in the wall of the supply tube into the outer fill tube (#32). However, Crowder also unequivocally teaches that a food ingredient (in this case, a second food ingredient) can be introduced into the flowable food product (#52) in a direction opposite to the flow direction of the flowable food product. Note that the supply tube/conduit for supplying the additional ingredient is angled backwards relative to the axis of flow. To modify Crowder and change the flow direction of the inner, food ingredient, relative to the flow of the flowable, food product, from a perpendicular direction to a direction that is opposite (as opposed to just transverse) is seen to have been an obvious expedient in view of Crowder's own teaching of reverse direction, ingredient introduction as well as Kinney who teaches turbulence and thus mixing is a function of the angle of inclination of his diverter blades (which will cause the food being introduced into a conduit in the

reverse direction of flow), thus causing swirling and thus a marbled appearance. Note that swirling inherently evidences reverse movement. Since Crowder already teaches employing ducts through the wall of the inner supply tube, which ducts do not contain any ledges and Crowder teaches applicant is not the first to introduce one food into another food in a direction that is opposed to the flow of the latter. To change the ducts from a 90 degree angle relative to the flow axis of the flowable food product to an angle that slants the duct to allow the food ingredient to be introduced into the flowable food product in a direction opposite to the flow of the latter would therefore have been obvious. Finally, it is noted that the pending claims are method claims and there are limitations as to what degree one can rely on apparatus recitations for patentability in a method claim. As recited by the art taken as a whole, the duct in the inner supply tube is conventional as is the concept of introducing one product into another opposite the latter's direction of flow. Once it is known to do that manipulative step, the particular conventional structure one uses to perform that step would have been obvious and/or irrelevant. Note that Crowder flows the product through a duct, which is applicants manipulative step as well. Crowder also teaches to angle a conduit relative to the axis of flow if one wants the material to be introduced against-the-stream. To angle the duct to allow for the "against-the-stream" introduction of the product as opposed to some other conventional structural element although of questionable weight in the method claim would nevertheless have been obvious for the reasons given above. Friedman, Gundlach et al and French et al are relied on as further evidence of supplying a food product with a food ingredient from a supply tube within

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the fill tube. In regard to the dependent claims, the dependent claims are rejected for the reasons given in the previous Office actions, keeping in mind that Crowder is now the primary reference. For example, whether one point of entry (i.e. duct) is employed or more than one and whether the points of entry are spaced from each other or not in the flow direction is seen to have been an obvious result effective variable, especially in view of the art taken as a whole. For example, it would have been obvious to modify Crowder and provide multiple and spaced points of entry (i.e. ducts) in view of Friedman and Gundlach et al.

All of applicants remarks filed 11/16/05 have been fully and carefully considered but are moot in view of the new ground of rejection which employs the same references as relied on previously but employs them in a different employing a different one of the group as the primary reference.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday from 7:00AM to 2:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR.

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Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Steve Weinstein*  
**STEVE WEINSTEIN**  
**PRIMARY EXAMINER** 1761  
2/3/06